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No. 84-1288

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

JOHN V. EVANS, ROSE BOWMAN, GEORGE BACHIK, and WILLIAM GRUZINSKI,
Petitioners,

v.

JEFF D., PAULA E., JOHN M., and DUSTY R., minors, by and through their next friend, CHARLES JOHNSON, III, individually and on behalf of the class they represent and MARK CLARY, intervenor,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF THE COUNCIL OF STATE GOVERNMENTS, THE NATIONAL CONFERENCE OF STATE LEGISLATURES, THE NATIONAL LEAGUE OF CITIES, THE NATIONAL ASSOCIATION OF COUNTIES, THE U.S. CONFERENCE OF MAYORS, AND THE INTERNATIONAL CITY MANAGEMENT ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether settlement negotiations on the merits of a civil rights action can include simultaneous negotiation of attorney's fees.

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INTEREST OF THE *AMICI* [1]

Amici are organizations whose members include state, county, and municipal governments and officials located throughout the United States. *Amici* and their members have a vital interest in legal issues that affect the powers

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[1] Pursuant to Rule 36 of the Rules of this Court, the parties have consented to the filing of this brief. Their letters of consent have been filed with the Clerk of the Court.

and responsibilities of such governments. This case presents an issue of great importance concerning the ability of these governments and their officials to make settlement offers to plaintiffs in civil rights litigation.

The court below ruled that simultaneous negotiation of attorney's fees and the merits should only be permitted "on a showing of unusual circumstances." Pet. App. 24a. Under such a rule, state and local governments and officials, as defendants in civil rights litigation, simply could not, in the vast majority of cases, determine the full extent of their liability through settlement negotiations. As a result, many cases that are currently settled out of court could no longer be resolved voluntarily, and both litigants and courts would be put to the unnecessary expense and demands of trials that should be avoided.

Because of the importance of this ruling to state and local governments and officials, *amici* submit this brief to assist the Court in its resolution of the case.

STATEMENT OF THE CASE

Petitioners, as defendants in a class action filed by respondents under 42 U.S.C. § 1983, engaged in extensive negotiations to reach a settlement. Petitioners conditioned the settlement on a waiver of respondents' attorney's fees. The final settlement agreement provided that "plaintiffs and defendants should each bear their own costs and attorney's fees thus far incurred, if so approved by the court." Pet. App. 10a. The district court approved the settlement.

The court of appeals reversed. The court held that respondents had improperly been required to waive the attorney's fees ordinarily available to civil rights plaintiffs, and then went on to rule that, in the absence of unusual circumstances, attorney's fees have no place in settlement negotiations. The court remanded the case to the district court for a determination of reasonable attorney's fees for respondents. Pet. App. 25a.

SUMMARY OF ARGUMENT

1. All of the major civil rights statutes allow the district court, in its discretion, to award attorney's fees to the prevailing party. A plaintiff who achieves substantial relief through settlement negotiations may be a prevailing party. Only through simultaneous negotiation of both the merits of plaintiff's claim and the plaintiff's attorney's fees can a defendant know the full implications of a settlement agreement into which it may consider entering. The alternative to simultaneous negotiation is a bifurcated procedure in which the question of fees is put aside for later negotiation or litigation after the merits are resolved. Because such a procedure leaves the defendant unsure about the total potential financial liability incurred under the settlement, the bifurcated procedure discourages settlement.

2. This Court's recent cases have stressed the importance of settlement of claims, including those for attorney's fees. These cases fully resolve the legal, policy, and ethical questions potentially arising from simultaneous negotiations of the merits and the attorney's fees.

3. Limiting the negotiability of attorney's fees would frustrate Congress' intent to improve enforcement of the civil rights laws. Nothing in the legislative history of the many civil rights statutes that authorize fee-shifting indicates that Congress intended to provide prevailing plaintiffs with an inalienable right to attorney's fees. Indeed, while some other fee-shifting statutes *require* that fees be awarded to the prevailing party, the civil rights fee-shifting statutes typically provide only for discretionary awards of fees. In addition, Congress made clear that the authorization of awards of attorney's fees was part of its overall effort to further the goals of civil rights legislation. Precluding simultaneous negotiations, however, would reduce the frequency of settlements and could diminish the amount of substantive relief afforded to plaintiffs in settlements, as well as increase the cost

and burden of enforcement and administration of the civil rights laws.

4. By including fees with all other elements of a claim during settlement negotiations, defense counsel meet their ethical obligations both to their clients and to the administration of justice. Attorneys owe a positive duty to their clients to reduce the clients' liability and risk of liability. By securing prompt resolution of the question of attorney's fees, simultaneous negotiations also serve the attorney's complementary duty of promoting the administration of justice. Settlements are encouraged, and the defendant is able to offer more substantive relief when its concern about potential fee liability is allayed. The ideal of autonomy on which the adversary system is based is also best achieved by assuring that clients have full knowledge of all terms of a proposed settlement.

5. The alternative to simultaneous negotiations is bifurcated negotiations. In addition to their obvious inefficiencies, bifurcated negotiations depend at least in part on the hidden discussion of those issues that are openly discussed in simultaneous negotiations. Thus, technically bifurcated negotiations fail to achieve even the minimal objective of avoiding simultaneous negotiation in fact. Moreover, bifurcated negotiation puts the court in a poorer position to review the fee award and provide meaningful relief to the plaintiff because the court does not have the facts of the case before it when it reviews the fee agreement.

6. Effective measures available to prevent or correct any prejudice to the plaintiff that might result from a conflict of interest include discussions and agreements between the attorney and the client; guidance from the court; and, if necessary, remedial action by the court. Moreover, to the extent that the problem is an ethical, and not a legal, one, its prevention and remediation lie in disciplinary measures by the bar, not a legal ruling by this Court.

ARGUMENT

I. SIMULTANEOUS NEGOTIATION OF ATTORNEY'S FEES WITH THE MERITS IS THE MOST EFFECTIVE MEANS OF ACHIEVING PROMPT AND JUST SETTLEMENT OF CIVIL RIGHTS LITIGATION

The narrow question presented to the court of appeals for review in this case was the propriety of defendant's insistence on a waiver of plaintiffs' attorney's fees as a condition of settlements. *Amici* take no position with respect to this issue. The court of appeals, however, went beyond that issue to formulate a broad rule precluding simultaneous negotiation of the amount of attorney's fees with discussion of settlement on the merits. It is this general rule that *amici* ask this Court to repudiate, because it serves neither the interests of the plaintiff nor those of the defendant in fixing reasonable attorney's fees; undercuts the intention of Congress and good judicial administration by discouraging settlements; and does not resolve the ethical problems faced by plaintiffs' attorneys in fee negotiations.

All major civil rights statutes allow the district court, in its discretion, to award attorney's fees to the "prevailing party." *See, e.g.*, 42 U.S.C. § 1988 (Civil Rights Attorney's Fees Awards Act of 1976; hereinafter "the Fees Act"); 42 U.S.C. § 2000e-5(k) (Title VII). In *Maher v. Gagne*, 448 U.S. 122 (1980), this Court held that a plaintiff who obtains relief through settlement rather than litigation is eligible to recover attorney's fees. The value of this policy to plaintiffs is that they need not be reluctant to settle a case simply to ensure recovery of attorney's fees. "Congress made clear its concern that civil rights plaintiffs not be penalized for 'helping to lessen docket congestion' by settling their cases out of court." *Marek v. Chesney*, No. 83-1437, slip op. at 8 (U.S. June 27, 1985), *citing* H.R. Rep. No. 1558, 94th Cong., 2d Sess. 7 (1976).

The policy of allowing plaintiffs to recover attorney's fees even if they settle their claims must be reconciled with defendants' need to know the full extent of liability at settlement. In a system of simultaneous negotiation of the merits and attorney's fees, all items of the relief sought are on the table at the same time.[2]

The alternative to simultaneous negotiation is a bifurcated procedure in which the question of attorney's fees is not discussed until after agreement has been reached on all other elements of the claim. At that point, attorney's fees could be negotiated by the parties or, more likely, awarded by the court. This Court has noted that "[t]here is no precise rule or formula for making these determinations [of attorney's fees]." *Hensley v. Eckerhart*, 461 U.S. 424, 436 (1983). Thus, without simultaneous negotiations a defendant will be unsure of its total liability even after it has agreed to settle all other items of a plaintiff's claim.

Amici's members, frequent defendants in civil rights litigation, have a strong interest in fair and timely settlement of all legitimate claims brought under the civil rights laws. *Amici* believe that the settlement mechanism enables both plaintiffs and state and local government defendants to achieve the outcome that is most efficient in terms of time and money. As the Court recently stated: "[i]n short, settlement rather than litigation will serve the interests of plaintiffs as well as defendants." *Marek, supra*, slip op. at 8. *Amici* believe that the simultaneous negotiation of the merits of a case and the appropriate attorney's fee, the route precluded by the

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[2] The attorney's fee component of a settlement resulting from simultaneous negotiations can take many forms. Plaintiff may accept a lump-sum settlement, agree to a "cap" on the amount of attorney's fees, or forgo attorney's fees. *Amici* do not believe that valid legal distinctions can be drawn among these various forms, nor can they be firmly separated in practice. Accordingly, our argument applies to any form of fee component except where noted.

Ninth Circuit, is the best way to promote such settlements. The monetary exposure that remains after the merits portion of a bifurcated negotiation procedure is unacceptable because it will make defendants reluctant to settle. Only a system that produces certainty and eliminates further risk of liability will promote settlements, the method of resolving litigation that is preferred by courts, by Congress, and by *amici*. As we discuss below, this Court's cases, the legislative history of the Fees Act, and the relevant ethical considerations all favor simultaneous negotiation of the merits and attorney's fees in civil rights cases.

II. THIS COURT'S CASES RECOGNIZE THE IMPORTANCE OF SETTLEMENTS THAT INCLUDE ALL ASPECTS OF LIABILITY

The decision of the court of appeals is irreconcilable with this Court's approach to the settlement of attorney's fee awards. *Amici* suggest that several recent opinions resolve the legal, policy, and ethical considerations surrounding simultaneous negotiations.

Marek v. Chesny did not specifically concern the simultaneous negotiation of damages and attorney's fees, but the opinion makes clear that this is the procedure that the Court envisioned.[3] *Marek* held that, under Fed. R. Civ. P. 68, a defendant is not liable for attorney's fees incurred by a plaintiff subsequent to an offer of settlement by the defendant. In holding that an offer of judgment need not separately indicate proposals for damages

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[3] Even without the benefit of this Court's opinion in *Marek*, several courts of appeals have held, as *amici* urge, that simultaneous negotiation of the merits and fees is permissible. *See Moore v. National Association of Securities Dealers, Inc.*, 762 F.2d 1093 (D.C. Cir. 1985); *Lazar v. Pierce*, 757 F.2d 435 (1st Cir. 1985); *Gram v. Bank of Louisiana*, 691 F.2d 728, 730 (5th Cir. 1982) (dictum); *Chicano Police Officer's Ass'n v. Stover*, 624 F.2d 127, 132 (10th Cir. 1980).

and for costs, the Court chose the "construction of the Rule [that] best furthers the objective of the Rule, which is to encourage settlements." Slip op. at 4. As the Court explained:

> If defendants are not allowed to make lump sum offers that would, if accepted, represent their total liability, they would understandably be reluctant to make settlement offers. As the Court of Appeals observed, "many a defendant would be unwilling to make a binding settlement offer on terms that left it exposed to liability for attorney's fees in whatever amount the court might fix on motion of the plaintiff."

Ibid. (citation omitted).[4]

Similarly, in *Hensley v. Eckerhart*, 461 U.S. 424 (1983), the Court considered a challenge to an attorney's fee awarded following litigation over conditions at a state hospital.[5] The Court noted that "[a] request for attorney's fees should not result in a second major litigation. Ideally, of course, litigants will settle the amount of a fee." *Id.* at 437.[6] Although the Court in *Hensley* did not discuss the procedure for settlement of attorney's fees, it is clear that such a settlement will be facilitated when it is considered at the same time as the merits of

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[4] *See also White v. New Hampshire Dept. of Empl. Sec.*, 455 U.S. 445, 454 n.15 (1982): "In considering whether to enter a negotiated settlement, a defendant may have good reason to demand to know his total liability from both damages and fees."

[5] *Hensley* held that if the district court awards fees, "the extent of a plaintiff's success is a crucial factor in determining the amount" of those fees. 461 U.S. at 440.

[6] *See also Blum v. Stenson*, —— U.S. ——, 104 S.Ct. 1541, 1550 n.19 (1984) ("Parties to civil rights litigation in particular should make a conscientious effort where a fee award is to be made, to resolve any differences.").

the case. First, defendants who settle the merits of a case have an interest in settling the amount of any attorney's fee in order to know the full extent of their liability in the case. As the Court noted in *Marek*, defendants are understandably reluctant to settle without such knowledge. Second, defendants who settle the merits of a case without resolution of the fee award risk "major litigation" over the fee award. Even if it is the first and not the "second major litigation" of a case, defendants will be similarly reluctant to settle in such circumstances. The best way to promote the policy articulated in *Hensley* is simultaneous settlement of both the merits of a case and the fee award.[7]

In *White v. New Hampshire Department of Employment Security*, 455 U.S. 445 (1982), the Court discussed the contention that "prejudgment fee negotiations could raise an inherent conflict of interest between the attorney and client." *Id.* at 453-54 n.15.[8] The Court decisively rejected the rule adopted by the court below in this case: the sweeping proposal that "to avoid this conflict of interest any fee negotiations should routinely be deferred until after the entry of a merits judgment." *Id.* at 454 n.15. The Court stated: "Although such [prejudgment fee negotiations] situations may raise difficult ethical issues for a plaintiff's attorney, we are reluctant

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[7] *See Carson v. American Brands, Inc.*, 450 U.S. 79, 87 (1981): "Settlement agreements may . . . be predicated on an express or implied condition that the parties would, by their agreement, be able to avoid the costs and uncertainty of litigation."

[8] In *White*, the Court held that a post-judgment request for attorney's fees is not a "motion to alter or amend the judgment" subject to the requirement in Fed. R. Civ. P. 59(e) that such motions must be served not later than ten days after the entry of judgment. The Court noted that a request for attorney's fees "raises legal issues collateral to the main cause of action." 455 U.S. at 451.

to hold that no resolution is ever available to ethical counsel."

Accordingly, *amici* suggest that this Court has already considered the legal, policy, and ethical issues presented, and that its conclusions require reversal of the ruling below.

III. SIMULTANEOUS NEGOTIATIONS FURTHER THE GOALS THAT THE FEE-SHIFTING PROVISIONS OF THE CIVIL RIGHTS LAWS INTENDED TO PROMOTE

A. Congress Did Not Intend to Make Attorney's Fees Nonnegotiable

Congress has indicated that a prevailing plaintiff in civil rights litigation "should ordinarily recover an attorney's fee unless special circumstances would render an award unjust." S. Rep. No. 1011, 94th Cong., 2d Sess. 4, *reprinted in* 5 U.S. Code Cong. & Ad. News 5908, 5912 (1976) (hereinafter "Senate Report").

The legislative history of the civil rights fee-shifting statute does not specifically discuss the practice of simultaneous negotiations. At the time that the Fees Act was passed, however, Congress was well aware of over fifty provisions for attorney's fees in a wide variety of statutes. *See* H.R. Rep. No. 1558, 94th Cong., 2d Sess. 2 (1976) (hereinafter "House Report"). Prior to that time, no court had ever held that any of these other fee-shifting statutes precluded simultaneous consideration of the merits and attorney's fees during settlement negotiations. The Senate Report makes quite clear that the Fees Act "creates no startling new remedy" and should be "governed by the same standards which prevail" in other statutes which utilize "the traditionally effective remedy of fee-shifting." Senate Report at 6. Against this background, no limitation on the negotiability of attorney's fees may be inferred from congressional silence on this subject in the legislative history of the Fees Act.

In addition, the House Report notes, at p. 4, that Congress has differentiated among four types of fee-shifting statutes: (1) mandatory awards only for a prevailing plaintiff; (2) mandatory awards for any prevailing party; (3) discretionary awards for a prevailing plaintiff; and (4) discretionary awards for any prevailing party. The civil rights fee statutes are in the last category. The Report makes clear that this choice was purposeful: "Congress has passed many statutes *requiring* that fees be awarded to a prevailing party. Again the committee adopted a more moderate approach here . . . ." *Id.* at 7 (emphasis in original). Even statutes that provide for mandatory awards of attorney's fees have never been interpreted to restrict the negotiability of fees. *See, e.g., Grunin v. International House of Pancakes*, 513 F.2d 114 (8th Cir.), *cert. denied*, 423 U.S. 864 (1975) (settlement of a claim under the Clayton Act, which requires payment of attorneys' fees to the prevailing plaintiff, included provision setting amount of fees). *A fortiori*, discretionary fee awards should be open to discussion at settlement negotiations on the merits.

B. Simultaneous Negotiations Promote the Purposes and Policies of the Civil Rights Laws

Fee-shifting provisions seek to ensure "vigorous enforcement of modern civil rights legislation, while at the same time limiting the growth of the enforcement bureaucracy." Senate Report at 4. Simultaneous negotiations promote these purposes and policies. Enforcement is fostered through the prompt, full settlement of legitimate claims; and the courts are spared the burden of trials that would become necessary if simultaneous negotiations were prohibited.

1. *Vigorous Enforcement of the Civil Rights Laws*

This Court has recently noted that "[t]here is nothing incompatible" between the objectives of "encourag[ing] settlements" and "encourag[ing] plaintiffs to bring meri-

torious civil rights suits." *Marek v. Chesney*, No. 83-1437, slip op. at 9 (U.S. June 27, 1985). Similarly, one court of appeals recently pointed out, in the context of a Title VII case, that the concept of the "private attorney general" must be balanced against the equally important policy of encouraging settlement of civil rights cases. That court, remarking on the similarity of the attorney's fees provision of Title VII to the Fees Act, relied on the legislative history and judicial interpretation of that Act to hold that simultaneous negotiation of merits, fees, and costs should not be prohibited completely. *See Moore v. National Association of Securities Dealers, Inc.*, 762 F.2d 1093, 1094, 1097 n.7, 1099, 1104, 1106 (D.C. Cir. 1985).[9]

Simultaneous negotiations, in fact, may lead to monetary settlements that are more generous to the plaintiff, because a defendant certain about the total liability will not feel the need to reduce the settlement offer on the merits to provide a cushion for later payment of attorney's fees. In addition, where a fee award is part of a lump-sum settlement resulting from simultaneous negotiations, a reduction in the fee request by plaintiff's attorney could result in additional compensation to the plaintiff. By contrast, a post-settlement reduction by the court in the fees requested by plaintiff's counsel can accrue only to the benefit of the defendant.

There is no reason to fear that allowing simultaneous negotiations will act as a disincentive to plaintiffs' at-

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[9] The court also held that in certain circumstances the plaintiff may voluntarily waive claims to statutory fees and costs. *Accord Lazar v. Pierce*, 757 F.2d 435, 438 (1st Cir. 1985) ("Of course plaintiff's counsel may elect to waive [fees]."). A concurring opinion noted that "if constitutional rights can consciously be waived by a defendant in a criminal case, it would be an excess in paternalism to conclude that parties to a civil dispute cannot do likewise." *Id.* at 439 (Torruella, J., concurring) (footnote omitted).

torneys in civil rights cases. First, as the court of appeals noted in *Moore*, the mere practice of simultaneous negotiation does not determine whether a fee will be awarded or the amount of the fee; those issues are determined by the strength of the plaintiff's case. *See Moore*, 762 F.2d at 1105, 1110. Plaintiffs' attorneys generally evaluate these factors prior to filing suit. *See, e.g., Model Code of Professional Responsibility*, DR 2-109 (hereinafter "*ABA Code*"). Second, even if a negotiated fee were less than a court might award in certain cases, plaintiffs' attorneys who settle rather than litigate are able to conserve their time and thus a lower attorney's fee may adequately compensate them for their services.

2. *Ease of Judicial Administration*

In the absence of simultaneous negotiation and settlement of the merits and attorney's fees, the courts would be forced to resolve at trial the merits of civil rights claims which defendants cannot settle because they cannot agree on attorney's fees. In addition, the amount of fees would then have to be determined by the court. Under a settlement encompassing both the merits and attorney's fees, the court would, of course, retain ultimate supervisory authority over the fee award. The burden on the court, however, would be significantly less if the parties have first negotiated the amount of the fee than if the court must itself preside over a mini-trial on the question of fees. *Cf. Hensley v. Eckerhart*, 461 U.S. at 437 ("[A] request for attorneys' fees should not result in a second major litigation."). In many cases, moreover, the burden and costs of the litigation over fees far exceed those of a resolution of the merits. *See, e.g., Chrapliwy v. Uniroyal, Inc.*, 509 F. Supp. 442 (N.D. Ind. 1981), *aff'd in part and rev'd in part*, 670 F.2d 760 (7th Cir. 1982), *reh'g and reh'g en banc denied* (April 13, 1982), *cert. denied*, 461 U.S. 956 (1983), *on remand*,

583 F. Supp. 40 (N.D. Ind. 1983); *Parker v. Califano*, 411 F. Supp. 1059 (D.D.C. 1976), *aff'd*, 561 F.2d 320 (D.C. Cir. 1977), *on remand*, 443 F. Supp. 789 (D.D.C. 1978). Thus, to the extent that simultaneous negotiations can avoid or simplify fee litigation, such negotiations will further the congressional purposes and policies of the civil rights laws, as disclosed in the legislative history.

IV. DEFENSE COUNSEL'S ETHICAL OBLIGATIONS TO THEIR CLIENTS AND TO THE ADMINISTRATION OF JUSTICE ARE BEST MET BY ENSURING THAT SETTLEMENTS RESOLVE THE AMOUNT OF FEES AS WELL AS THE ISSUE OF DAMAGES

This Court has noted that simultaneous negotiation "may raise difficult ethical issues for a plaintiff's attorney." *White v. New Hampshire Department of Employment Security*, 455 U.S. at 454 n.15. *Amici* also recognize that such issues may arise. But just as the Court was "reluctant to hold that no resolution is ever available to ethical counsel," (*ibid.*), *amici* submit that simultaneous negotiations are not only permissible but should be encouraged. Safeguards exist to prevent unfairness to the plaintiff; the prohibition of simultaneous negotiations is not necessary. Moreover, ethical considerations also plague bifurcated negotiations. In fact, such negotiations may present additional ethical problems for plaintiff's counsel. Thus, the better reasoned opinions from both courts and bar associations agree that ethical counsel may engage in simultaneous negotiations with care.

A. Simultaneous Negotiations Further the Client's Interests and the Administration of the Adversary System

Neither the *ABA Code* nor the *Model Rules of Professional Conduct* (hereinafter "*Model Rules*") addresses whether simultaneous negotiations are permissible. Although commentators have generally held opinions as divergent as those of the circuit courts on this issue,

all seem to agree that the *ABA Code* and the *Model Rules* do not support a condemnation of simultaneous negotiations. *See* Comment, *Settlement Offers Conditioned Upon Waiver of Attorneys' Fees: Policy, Leyal, and Ethical Considerations*, 131 U. Pa. L. Rev. 793, 812 (1983); Rhode, *Class Conflicts in Class Actions*, 34 Stan. L. Rev. 1183, 1208 (1982).

State bar ethics committees have generally not prohibited simultaneous negotiations. The District of Columbia Bar Legal Ethics Committee, for instance, was

> not prepared to find that offers of a single sum by a defendant in settlement of [civil rights] litigation is unethical. Society's interest in encouraging disposition of these and other cases through compromise, and a defendant's legitimate interest in defining his liability by settlement in lieu of trial, both require that this type of offer should be encouraged, not hindered.

Opinion No. 147, The District of Columbia Bar Legal Ethics Committe, *reprinted in* 113 The Daily Washington Law Reporter 389, 394 (1985).[10] Similarly, a subcom-

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[10] The Legal Ethics Committee did conclude that the defendant may not condition an offer of settlement upon an agreement by plaintiff's counsel to waive or limit attorney's fees. The Bar Association of the City of New York apparently agrees. *See* Opinion No. 80-94, Committee on Professional & Judicial Ethics of the Bar Ass'n of the City of New York, *Settlement Offers in Public Interest Litigation Conditional on Waiver of Statutory Fees, reprinted in* 36 Record of B.A.C.N.Y. 507 (1981).

The distinction between a waiver by the plaintiff and a demand for waiver by the defendant also received consideration in *Moore v. National Association of Securities Dealers, Inc.*, 762 F.2d 1093 (D.C. Cir. 1985). There, the court held that simultaneous negotiations should not be completely prohibited and that plaintiffs may voluntarily waive attorney's fees if they do so without a demand by the defendant. The court did not decide whether defense counsel could raise the issue by making a settlement offer that encompassed both the merits and an attorney's fee. *See id.* at 1105, nn.17, 18. The dissent found the distinction be ween plaintiff-suggested waiver

mittee appointed by the chief judges in the District of Columbia emphasized that defendants' settlement offers that include fee provisions are usually not motivated by a desire to create attorney-client conflicts or to bulldoze plaintiffs' attorneys into accepting inadequate fees. Rather, defense counsel act to further their clients' interests in defining their total exposure. Noting that "the legitimate interest of the fee shifting provisions must be balanced against the legitimate interest of the defendant . . . in making an offer which will fix liability with considerable certainty," the subcommittee concluded that "the simultaneous settlement of fee disputes does not necessarily create an impermissible conflict of interest." [11]

As these materials suggest, defense counsel's affirmative duty to represent their clients' interests zealously may *require* counsel to raise the fee issue in settlement negotiations.[12] This duty to their clients complements

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and defendant-coerced waiver to be illusory. *See id.* at 1114 (Wright, J., dissenting). The dissent, therefore, would have prohibited simultaneous negotiations altogether. *Amici* agree that the process of negotiation may make it difficult at times to distinguish offers from demands or to identify exactly where and when an offer originated. But the solution is not to prohibit all simultaneous negotiations, but to allow them subject to appropriate review by the court of the settlement reached.

[11] Report of the Subcommittee of Lawyer Members of the Committee on Attorney Fees appointed by the Chief Judges of the United States District Court and United States Court of Appeals for the District of Columbia, *reprinted in* Bar Report, Aug./Sept. 1984, p. 4, at p. 6.

[12] Judge Torruella, concurring in *Lazar v. Pierce*, 757 F.2d 435, 439 (1st Cir. 1985), recently concluded:

> A settlement package of a civil rights action may consist of one or more of the following items: (1) monetary damages, (2) equitable relief, (3) costs, and (4) attorney's fees. In settling a case for his client, a defendant's counsel does his client a disservice if he settles a case as to one or more of these items, but leaves open the possibility of further recovery or action on any of the remaining ones. Within the bounds of ethics and

their obligation to further the administration of justice. Even a critic of simultaneous negotiations conceded that such negotiations "arguably promot[e] the administration of justice if the relief offered by the defendant to the plaintiff terminates a violation of a civil rights statute." Comment, *Settlement Offers*, *supra*, 131 U. Pa. L. Rev. at 811.

Finally, much of the "real value of the adversary system" lies in "its contribution to the ideal of individual autonomy." G. Hazard, *Ethics in the Practice of Law* 129 (1978). Both the *ABA Code* and the *Model Rules* are careful to reserve to the client the authority to make final decisions affecting the nature of a settlement. *See, e.g.*, *ABA Code*, EC 7-7, 7-8; *Model Rules*, Rule 1.2. Yet, typically, civil rights plaintiffs have very little say about the day-to-day progression of their action. A plaintiff cannot make an intelligent decision to accept or reject a proffered settlement without knowledge of the amount of attorney's fees that may ultimately be negotiated or awarded. Encouraging simultaneous negotiations will best serve the interests of the client, the administration of justice, and the adversarial system.

B. Bifurcated Negotiations Are Inefficient and Do Not Eliminate the Potential for Conflicts of Interest

Bifurcated negotiations are inefficient for two reasons. First, although perceived as a way of preventing simultaneous negotiation of the merits and attorney's fees, in fact they may not do so. So-called bifurcated negotiations of the merits in cases for which attorney's fees are authorized by statute do not occur in a vacuum; the parties are fully aware that a claim for attorney's fees will follow. Because defendants must have some sense of their total potential liability, the lurking issue of at-

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fair play, an attorney owes a positive duty to his client to reduce his liability and his exposure to recovery to the limits of the attorney's ability. This applies to all the items as to which judicial relief can be sought.

torney's fees may affect the negotiation of the merits even if the fees are not explicitly discussed.

Thus, in a sense, all settlement negotiations are simultaneous negotiations. One court has noted that a bifurcated rule "would be difficult to enforce since it is not always possible to determine when the parties violate the rule and engage in informal discussions on fees." *Moore*, 762 F.2d at 1101 n.13.[13] Prohibiting simultaneous negotiations therefore is not an effective solution to the ethical problems presented by such negotiations.

Second, bifurcated negotiations produce two agreements, rather than one, for the court to review. In addition to placing additional demands on the court's time, such a procedure detracts from the quality of judicial review of settlements. Because the court does not have the entire settlement agreement before it, it has less opportunity to become aware of and to correct any prejudice to the plaintiff that might have resulted from a conflict of interest between attorney and client.[14]

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[13] Interviews with district court judges in the Third Circuit, which is widely supposed to require bifurcated negotiations, reveal that "exchanges of information" are even encouraged. *See* Comment, *Settlement Offers Conditioned Upon Waiver of Attorneys' Fees: Policy, Legal, and Ethical Considerations*, 131 U. Pa. L. Rev. 793, 804-805, n.90 (1983). As has been noted, "[i]t sometimes will be difficult to distinguish this type of information exchange from an informal agreement." A. Miller, *Attorneys' Fees in Class Actions* 223 (1980). Hence, "the net result [of requiring bifurcated negotiations] might be to increase informal agreements among counsel or to encourage withholding agreements on fees from the judge until after the settlement is approved." *Id.* at 222.

[14] One commentator has noted with respect to the settlement of class action litigation, that "[o]nly if the aggregate of all payments to be made by defendant is disclosed in the proposed settlement can the class members and the court make any intelligent judgment about the fairness and reasonableness of a proposed settlement." 1 J. Moore, J. Lucas, H. Fink, D. Weckstein & J. Wicker, *Moore's Federal Practice*, pt. 2, § 1.46, p. 75 (2d ed. 1985).

Bifurcated negotiations in fact may produce their own ethical problems. The attorney's fees provisions authorize an award of attorney's fees to the prevailing *party*. Although courts typically award these fees directly to the attorney, both the *Model Rules* and the *ABA Code* prohibit an attorney from acquiring an interest in the litigation. *See ABA Code*, DR 5-103(a); *Model Rules*, Rule 1.8(j). Consideration of the attorney's fees at the same time as all other aspects of the settlement prevents the appearance that the fees are a distinct part of the settlement in which only the attorney has an interest.

C. Current Law Provides Ready Solutions to Any Potential Ethical Conflict

Counsel who perceive ethical problems have numerous avenues for solutions. Many problems can be avoided by an open and frank exchange between the plaintiff's attorney and his or her client about potential conflicts. *Model Rules*, Rule 1.4. Retainer agreements also are useful in preventing misunderstandings. *See generally Moore*, 762 F.2d at 1105 n.17. If such routine practices are not sufficient in a particular case, counsel may seek help from the court, which is authorized by the Federal Rules of Civil Procedure to provide review and guidance. *See, e.g.*, Fed. R. Civ. P. 16 (pretrial conference for discussion of settlement); Rule 23(e) (settlement of class action only with approval of the court). If plaintiff's counsel does improperly compromise his or her client's interest, the Rules empower the court to review a settlement reached following simultaneous negotiations and to provide relief. In addition, the fee-shifting statutes themselves provide the court with significant power, to date largely unused, to review settlement agreements. Under the fee statutes, the court may "in its discretion" award a reasonable attorney's fee. The court thus possesses discretionary power to review the terms of any settlement reached after simultaneous negotiations, including, in an appropriate case, the authority to require specific evidence of consent by the plaintiff.

In any event, to the extent that the problems that arise from simultaneous negotiations are ethical problems, the appropriate solution is in the ethical, not the legal, arena. The bar, through the guidance of formal opinions and the enforcement device of disciplinary proceedings, is the proper vehicle for solution of ethical problems. This Court should not address what is essentially an ethics issue by endorsing a legal interpretation of the fee-shifting statutes that will discourage settlements and impede effective enforcement of the civil rights laws.

CONCLUSION

For the foregoing reasons, this Court should reverse and remand this case to the Ninth Circuit for reconsideration in light of the principle that parties in civil rights cases may engage in simultaneous negotiations to settle both the merits and the attorney's fees.

Respectfully submitted,

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